Supreme Court, U.S.
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No. 01-1201

In the

Supreme Court of the United States

CITY OF LAKEWOOD,

Petitioner,

v.

FAIR HOUSING FOUNDATION OF LONG BEACH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT FAIR HOUSING FOUNDATION OF LONG BEACH

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SUMMARY OF ARGUMENT

Petitioner City of Lakewood ("Lakewood" or "City") strains to create reviewable issues for this Court when, in fact, it is simply unhappy with the well-reasoned, unanimous decision of Ninth Circuit Judges Noonan, Silverman and Paez. The questions presented for review by petitioner turn the underlying opinion upside down by focusing on its constitutional rights, and ignoring the rights of respondent Fair Housing Foundation of Long Beach ("FHF"). In actuality, the appropriate inquiry at the appellate level was whether petitioner was entitled to summary judgment on *respondent's* claims of violation of its constitutional and statutory rights. The Circuit Court decided that Lakewood was entitled to summary judgment on FHF's First Amendment claim, but that there were disputed facts on the Fair Housing Act claim necessitating reversal. As this Opposition will point out, there is nothing novel or unusual about the Ninth Circuit's holding in this case, let alone anything that would demonstrate the need for this Court to review the decision. Petitioner's cries of circuit conflict and First Amendment violation are phantom issues manufactured solely to justify *certiorari*. Indeed, the Ninth Circuit's decision is solidly based in the decisions of this and other courts.

Respondent's points are briefly summarized as follows:

1. Petitioner is incorrect when it argues that, if conduct does not violate the First Amendment, it therefore may not violate any other law.

2. The decision that respondent FHF was not protected by the First Amendment from a patronage dismissal because it was a "policymaker", is not determinative of whether it was protected under the Fair Housing Act from petitioner's retaliatory conduct. Courts around the country have consistently analyzed the additional

claims of persons whose First Amendment claims were dismissed because they were found to be policymakers under the standards applicable to those claims.

3. Triable issues of fact exist regarding whether Lakewood violated the Fair Housing Act ("FHA") after conduct protected, or even arguably protected, under the *Noerr-Pennington* First Amendment doctrine, or the First Amendment generally, is excluded from consideration. The Ninth Circuit was correct when it concluded that most of Lakewood's conduct was not protected by *Noerr-Pennington*, and for that which may have been, the record was inadequate to allow summary judgment.

4. The Ninth Circuit's decision that respondent FHF had standing to bring an FHA claim is consistent with Congressional intent and prior decisions of this Court and circuits around the country. This Court has consistently held that standing under the FHA extends to the full limits of Article III, a proposition consistent with the broad remedial purpose of the FHA. The Housing and Community Development Act does not limit the scope of the FHA.

I. STATEMENT OF FACTS.

The *Walker* opinion adequately summarized the salient facts, and we refer the Court to the opinion. Here, we will highlight certain facts.[1] FHF operated a fair housing counseling program for Lakewood under contract, a practice common among many cities as a means of meeting its Community Development Block Grant ("CDBG") obligations, and had done so since 1990 after being urged to hire a professional fair housing organization by federal regulators concerned about Lakewood's performance. As a condition of receiving CDBG funds, the City was obligated to have a

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[1] Facts not stated by the Ninth Circuit opinion are contained in the underlying record.

housing program for the City that operates to "affirmatively further fair housing." The contract expressly stated that "*neither City nor any of its officers or employees shall have any control over the conduct of FHF's activities* or the employees of FHF.... it being distinctly understood that FHF is, and shall at all times remain as to City, a wholly independent contractor..." (emphasis supplied). The purpose of the clause was to ensure that FHF could always exercise its independent judgment regarding how best to further the interests of fair housing, unhindered by political or other considerations.

The contract required that FHF submit regular reports to establish that services were being provided as called for by the contract, and FHF did so. Prior to the events surrounding this litigation, the City did not seek to confer with FHF on, or direct FHF in, FHF's performance; did not audit or directly monitor FHF's performance, and did not communicate any dissatisfaction with FHF's performance. FHF operated out of its own facilities, not out of the City's offices. It did not interact daily or even routinely with City officers or employees on the specifics of the fair housing claims presented to it. FHF investigated housing discrimination complaints (for all cities it contracted with, including Lakewood) pursuant to uniform standards derived from training and/or guidelines received by FHF personnel on how to comply with the applicable federal standards, with which its contract with Lakewood obligated it to comply. Consistent with such practices, FHF assured complainants that FHF would hold the specifics of the investigations it conducted confidential, and FHF sought to do just that.

FHF considered itself obligated to investigate all complaints of discrimination that it considered meritorious. Its determinations of the merits of any matter brought to its attention were not influenced in any respect by who might be affected by their conclusions, whether it be a city official or a partisan supporter of any city official. It had only one job – to

bring to bear its knowledge, training and skills to most effectively fight housing discrimination.

On September 2, 1992, a group of tenants and former tenants of the Park Apartments complex in Lakewood (the "Park Tenants" or "Park Plaintiffs") contacted the FHF, alleging that the Park Apartments management company was engaged in racial discrimination and harassment. After complainants requested that FHF refer the case to private counsel, a standard practice by fair housing organizations, FHF contacted the law firm of Traber, Voorhees & Olguin, which unsuccessfully attempted to resolve the case prior to litigation.

On July 29, 1993, FHF advised the City that the residents of the Park Apartments were going to file a lawsuit against the owners and managers of the complex and that a press conference was going to be held at FHF's offices on the following day. FHF provided the City with a copy of the press release and a "case narrative," outlining the history of the anticipated litigation. The press release included a statement by the FHF's Executive Director that the conduct at issue "send[s] the message to yet another generation of young African-Americans that they are still not welcome in middle class cities *like* Lakewood" (emphasis supplied). The Executive Director testified that this was not a comment about Lakewood, but Lakewood nonetheless took it as a direct accusation of racism.

The Park Tenants filed suit on July 30, 1993, claiming violations of the Fair Housing Act, among other things. (That action was ultimately resolved by a consent decree approved by then-District Judge Wardlaw on April 2, 1997.) On August 4, 1993, Scott Barker, Vice President of the Park Apartments' management company and a named defendant in the Park lawsuit, sent a letter to City officials complaining about the lawsuit, and FHF's investigation and aiding of the Tenants. Barker asked the City officials to "[p]lease review the policies

of the Foundation and ask them to truly investigate claims prior to making statements in the newspaper." The top of the letter had a handwritten note saying, "We will be responding to this request!-Jack G." Jack Gonsalves is Assistant Director of Community Development for the City. On August 17, 1993, Charles K. Ebner, the City's Director of Community Development, sent a letter to FHF requesting a meeting to discuss "possible contract violations." Ebner wrote FHF a second letter, on September 23, 1993, contending that FHF "exercised poor judgement [sic] concerning the press release and conference in The Park apartments case.... The handling of The Park apartments case, and in particular the press conference, leaves us with serious concerns for the future.... Quite frankly we are looking for some assurance on the part of FHF that a similar scenario will not occur in the future and that you will have more regard for the community of Lakewood."

The City showed continual displeasure towards FHF, and sought in various ways to limit and/or chill its activities protected under the FHA. Among other things, the City sought confidential information regarding the tenants' claims and sought to have FHF modify its uniform case practices to avoid any future recurrence of what had happened in the Park Apartments case. The City asked FHF to substantially limit the aid and assistance provided to those complaining of perceived housing discrimination, to keep the City better informed of the details of its cases, and to transfer final responsibility for resolution of its cases to the City. When FHF agreed to only minimal changes, and offered detailed explanations for its position, the City sought to force FHF into making the changes through a variety of acts including, but not limited to:

- Withholding, for several months, funds earned by FHF under its contract, while continuing to seek changes in the way FHF conducted business;
- monitoring FHF board meetings and activities;

- subjecting FHF's contract activities to heightened scrutiny;
- making statements that FHF was unreliable and had acted wrongly in the City's discussions with representatives of the federal regulator, the Dept. of Housing & Urban Development ("HUD"); and
- making statements that FHF was unreliable and had acted wrongly in contacts with other city governments with whom Lakewood knew FHF was also under contract.

By the end of 1993, FHF concluded that the City did not intend to renew its contract for the following year, and that the City was retaliating, and would continue to retaliate against FHF. After learning that the tenants planned to amend their lawsuit to include Lakewood itself as an added defendant, FHF decided to also seek redress for the City's conduct against it. FHF therefore sought to join the lawsuit, both as a class representative and for redress for its claim that the City was interfering in FHF's proper functioning as a fair housing services provider, engaging in retaliatory acts for FHF's course of conduct in assisting the tenants with their claims, and refusing to change its practices to those desired by the City. The District Court allowed the tenants to add Lakewood to the lawsuit, but it did not allow FHF to join the action. Instead, the court stated that FHF could pursue a separate case if it chose to do so.

Although the City had renewed FHF's contract from 1990 to 1993 without requiring FHF to submit a new bid each year, the City sent out requests for proposals to various fair housing organizations to replace the FHF. The City did not ask FHF for a bid. Only the Fair Housing Council of San Bernardino and FHF, which submitted a bid despite not receiving a request (which was the lowest bid), submitted proposals. FHF contends it was excluded from consideration, and the San Bernardino Fair Housing Council was chosen to receive the 1994-95 contract. FHF further

contends that Lakewood solicited a fair housing organization that would not engage in aggressive enforcement of the fair housing laws, including a lack of testing.

The City filed a third-party complaint against FHF and Shull for breach of contract and indemnity. In response, FHF filed a counterclaim against the City alleging interference and retaliation in violation of the FHA, the FEHA, and the First Amendment. Judge Tashima dismissed the complaint against Shull, and the breach of contract claim against FHF. District Judge Tevrizian granted summary judgment for FHF on the City's indemnity claim, and for the City on FHF's state and federal fair housing claims. The district court held that FHF did not have standing to sue under the FHA because the contract between the parties governed FHF's legal obligations and contemplated termination of the relationship. The district court also held that FHF did not have standing under the FEHA because that statute does not extend protection to independent contractors. Subsequently, the district court also granted summary judgment for the City on FHF's First Amendment retaliation claim. The Ninth Circuit reversed the former summary judgment and upheld the latter.

Petitioner's brief completely ignores the legal significance of the fact that this case was an appeal from a summary judgment. On an appeal from summary judgment, the reviewing court must determine *de novo*, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Walker v. City of Lakewood*, 272 F.3d 1114, 1122 (9th Cir. 2001); Federal Rule of Civil Procedure 56(c). This is significant because there are several instances of retaliatory conduct by the petitioner that the court considered in reaching its determination aside from conduct that implicated the First Amendment. In this case, when respondent FHF began to aid and encourage residents of an

apartment complex in the exercise of their fair housing rights, Lakewood retaliated by engaging in the following conduct: 1) it withheld payment to FHF which had been due under contract for several months; 2) it sent a letter suggesting that the City would not renew FHF's contract unless FHF apologized for its protected conduct; 3) it supervised FHF more closely than it had before; 4) it sent City officials to monitor FHF's monthly meetings; 5) it told FHF to curtail the amount of exposure it gave discrimination complaints; 6) it replaced FHF as the overseer of the City's fair housing program by refusing to renew FHF's contract; 7) it excluded FHF from competing for a subsequent contract; 8) it interfered with FHF's contract with another city by calling the Housing Manager for that city to complain about FHF's performance; and 9) it sued FHF for breach of contract. (The Ninth Circuit determined that, regarding the last two of these, it was "not clear from this record whether... the City ought to be able to claim a *Noerr-Pennington* defense," and left those two issues "for the district court to resolve on remand. With regard to the other allegedly retaliatory conduct, the doctrine does not apply and the City has no *Noerr-Pennington* defense." *Walker*, *supra*, at 1130, fn. 5.)

II. THE FACT THAT FHF'S POSITION AS A POLICYMAKER IMMUNIZED LAKEWOOD'S CONDUCT FROM FIRST AMENDMENT SCRUTINY DOES NOT MAKE THAT CONDUCT IMMUNE FROM SCRUTINY FOR VIOLATION OF OTHER STATUTES.

For the conduct described above, FHF sought to impose 42 U.S.C. §1983 liability on the City for retaliating against FHF's exercise of its First Amendment rights. The Ninth Circuit found that, under the *Elrod-Branti* line of

cases,[2] FHF occupied a policymaking position for the City, making it susceptible to termination for purely political reasons without violating the First Amendment. *Walker*, *supra*, at 1132. Thus, Lakewood could retaliate against FHF for its exercise of otherwise protected speech. *Id.* From this holding, Lakewood makes a rather bold assertion: since its conduct did not violate FHF's First Amendment rights, the same conduct cannot serve as the basis for liability under the Fair Housing Act or *any other law*. Lakewood does this by distorting the *Elrod-Branti* framework, stating that *Elrod-Branti* stands for the proposition that termination of a policymaker is independently protected First Amendment conduct, rather than the correct proposition that "there are certain types of public employment where political belief may be an appropriate job requirement, and *the First Amendment does not bar dismissal on political grounds.*" *Pleva v. Norquist*, 195 F.3d 905, 911 (7th Cir. 1999) (emphasis supplied). Thus, the *Elrod-Branti* analysis provides not that government officials are engaged in protected First Amendment activity, but that the First Amendment does not protect a terminated policymaker. The lack of a policymaker's First Amendment protection from termination does not immunize an employer from all liability, but only from liability on claims that it violated the First Amendment to do so.

Lakewood's argument is even more audacious when one considers that it cites no authority for the proposition and, instead, distorts opinions from various circuits. A brief scan of opinions from courts nationwide, however, indicates the opposite – that conduct deemed not violative of the First Amendment under *Elrod-Branti* must nonetheless be separately scrutinized under other applicable laws at issue to determine whether they were violated. While some opinions consider the policymaker status in analyzing the

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[2] *Elrod-Branti* is a shorthand reference to *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d. 547 (1976), and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).

requirements of other claims (e.g., the observation in *Pleva, supra*, that the plaintiff's policymaker status meant that a discretionary decision to terminate did not violate equal protection, which requires absence of a rational basis), they all analyze each claim separately, and none suggest that the First Amendment analysis was dispositive of the other claims. In *Duriex-Gauthier v. Lopez-Nieves*, 274 F.3d 4 (1st Cir. 2001), for example, after holding that termination of a "policymaker" on political affiliation grounds did not violate the First Amendment, the court conducted a separate analysis to determine whether the defendant was entitled to qualified immunity on a due process claim. *Duriex-Gauthier, supra*, at 12. In *Pleva v. Norquist*, 195 F.3d 905 (7th Cir. 1999), *supra*, the court found plaintiff was a "policymaker" and hence subject to *Elrod-Branti* exemption for patronage dismissals. The court then analyzed plaintiff's termination under the Fourteenth Amendment's due process clause, the Age Discrimination in Employment Act, and state contract law. *Id. See also Soderstrum v. Town of Grand Isle*, 925 F.2d 135 (5th Cir. 1991) (termination of policymaker also analyzed under due process clause); *Mazus v. Dept. of Transportation, Com. of Pennsylvania*, 629 F.2d 870 (3rd Cir. 1980) (termination evaluated under *Elrod-Branti* and Title VII sex discrimination); *Steele v. City of Bluffton*, 31 F. Supp. 2d 1084 (N.D. Ind. 1998) (termination of policymaker also analyzed under ADEA and ERISA). None of the cases involved the Fair Housing Act, whose breadth is coextensive with Article III. (See discussion in Section IV, *infra*.)

These cases reflect that the variety of constitutional rights and statutes are animated by different policy concerns, and are intended to remedy separate wrongs. An employee, for example, may allege that he was terminated both due to his political beliefs and due to his race. If we were to follow Lakewood's argument to its logical conclusion, a finding that the employee occupies a policymaking position, and is exempt from First Amendment protection, precludes the employee from seeking redress for his racial discrimination

claim regardless of how overt the discrimination may be. This would mean that, at the policy-making level, a government could adopt an overt policy that no one other than whites would be hired. To state the proposition is to demonstrate its obvious fallacy. In the instant case, Lakewood engaged in certain conduct in retaliation for FHF's exercise of First Amendment speech, because of FHF's role in assisting in the enforcement of fair housing laws. The Ninth Circuit correctly analyzed the First Amendment issue under *Elrod-Branti*, and the fair housing issue under the FHA.

There is one instance, not applicable here, where First Amendment "policymaker" analysis intersects with federal statutes, and that is with respect to the definition of a covered "employee" under Title VII and the ADEA. Title VII defines an "employee" as

> "an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or *an appointee on the policy making level* or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." 42 U.S.C. §2000e(f) (emphasis supplied).

The ADEA definition of "employee" is virtually identical, and exempting "appointees on the policy making level" from the Act. *See* 29 U.S.C. §630(f).

There is a split of authority on whether the test for determining if an employee is at the "policy making level", and is thus exempt from the protections of Title VII and the ADEA, should be the same test (*Elrod-Branti*) for

determining if an employee is a "policymaker" exempt from First Amendment protection. This will typically occur in cases where the terminated employee raises multiple claims under the First Amendment, and Title VII or the ADEA. The Seventh Circuit has used a single test to resolve the policymaker question under both the First Amendment and the employment discrimination statutes. *See Americanos v. Carter*, 74 F.3d 138, 143-44 (7th Cir. 1996); *O'Neill v. Indiana Commission on Public Records*, 149 F. Supp. 2d 582, 587-88 (S.D. Ind. 2001) ("In the Seventh Circuit, the test for determining whether an individual is a 'policymaker' and therefore not an 'employee' under Title VII is the same test applied by Supreme Court, first delineated in *Elrod v. Burns*"). In the Second Circuit, the analysis of employee status as a policymaker for First Amendment purposes does not control the Title VII inquiry. *Butler v. New York State Department of Law*, 211 F.3d 739, 746 (2nd Cir. 2000). Rather, the Second Circuit looks to the language of the discrimination statute at issue and to Congressional intent to define a policymaker. *Butler, supra*, at 747. *See also Tranello v. Frey*, 962 F.2d 244, 250 (2nd Cir. 1992). A District Court in the Fifth Circuit has similarly rejected an invitation to graft the *Elrod-Branti* exemption onto the Title VII definition of covered employees. *Gomez v. City of Eagle Pass*, 91 F. Supp. 2d 1000, 1005 at fn. 2 (W.D. Tex. 2000).

Under Lakewood's analysis, there should be no need for any such discussion or analysis because the status as a policymaker would be a *per se* bar to the other claims regardless of how the statute read. This line of cases, and the underlying statutes, make crystal clear that the question of whether someone is a policymaker is only relevant to the First Amendment analysis, unless a statute incorporates a similar test, such as Title VII and ADEA but not FHA. If a policymaker were automatically exempt from scrutiny for the same conduct under other statutes, there would be no need for Congress to carve out a policymaker exception in the

statute, as it has done under Title VII and the ADEA, but not under Title VIII.

III. NEITHER THE *NOERR-PENNINGTON* DOCTRINE NOR THE FIRST AMENDMENT ABSOLUTELY PROTECTS LAKEWOOD FOR THE RANGE OF ITS CONDUCT IN THIS CASE.

In finding that FHF presented enough triable issues of fact to survive summary judgment on its Fair Housing Act claim, the Circuit Court took great pains to point out that, even if certain of Lakewood's conduct could be deemed legitimate petitioning activity and thus protected under the *Noerr-Pennington* [*Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) ("Noerr"), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965) ("Pennington")] doctrine, there were sufficient instances of unprotected retaliatory conduct to form the basis of an FHA claim. *Walker*, *supra*, at 1130. It is misleading for Lakewood to argue that the Ninth Circuit greatly expanded the "interference" clause of the FHA to reach protected speech, given that the record establishes conduct that is not protected speech (*e.g.*, withholding payment due under the contract, the letter from Lakewood stating that payments would be withheld until FHF apologized, and demanding that FHF "curtail the amount of exposure" it gave discrimination complaints).

Noerr-Pennington only protects activity that takes the form of lobbying the government for redress. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993). The conduct for which there was no *Noerr-Pennington* protection included, in addition to that listed in the prior paragraph, sending a letter suggesting that the City would not renew FHF's contract unless FHF apologized for its protected conduct; supervising the FHF more closely than it had before;

sending City officials to monitor FHF's monthly meetings; and excluding FHF from consideration for a subsequent contract.

Further, under *Noerr-Pennington*, speech is not always immunized when it is combined with unlawful conduct. The evolution of *Noerr-Pennington* immunity and its exceptions began in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961). The defendants argued that the Sherman Act could not create liability for informing the public and the legislature of certain facts. This Court agreed, noting that "no violation of the [Sherman] Act can be predicated upon *mere attempts* to influence the passage or enforcement of laws." *Id.* at 135, 81 S. Ct. at 528 (emphasis supplied).

However, where defendants have combined legal activities such as lobbying with the unlawful objective of price fixing, the analysis differs. "It is well settled that *First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.*" Precious as First Amendment rights are, they "may not be used as the means or the pretext for achieving substantive evils." Accordingly, a "combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group are ways of building up one empire and destroying another.... If these facts are proved, a violation of the antitrust laws has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 514, 92 S. Ct. 609, 611, 30 L. Ed. 2d 642 (1972)(emphasis supplied). *See also Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1263-64 (9th Cir. 1982), *cert. denied* 459 U.S. 1227, 103 S. Ct. 1234, 75 L. Ed. 2d 468 (1983)("When [First Amendment

protected] petitioning activity is but a part of a larger overall scheme to restrain trade, there is no overall immunity....Here, the allegation is that the defendants conspired to fix rates and allocate customers, and used the protest mechanism of the ICC to further this conspiracy. Protests before the ICC are legitimate mechanisms for enforcing rights. Even if the protests to the ICC were legitimate, if they were part of a larger antitrust conspiracy, the conspiracy is subject to the antitrust laws").

Very little of Lakewood's conduct can be construed as lobbying or petitioning in any sense. The Ninth Circuit acknowledged that the *Noerr-Pennington* doctrine may be available to Lakewood to insulate itself from FHA liability for two specific types of conduct: (a) contacting other cities to complain about FHF, and (b) filing a lawsuit against FHF. *Walker*, *supra*, at 1130, fn. 5. ("The City's right to engage in these types of activities may be protected under the Noerr-Pennington doctrine....") However, the court rightly remanded the matter to the trial court to resolve factual issues as to whether complaining to other cities constituted petitioning, and whether Lakewood's lawsuit against FHF was a sham and objectively baseless. Even if *Noerr-Pennington* did reach this conduct, it did not reach the other conduct discussed above.

Nor can it be said that Lakewood's conduct constituted protected "advocacy" within the meaning of *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000).[3] *White* is a pure speech case, where there was no exercise of any

[3] *White v. Lee* held that certain acts of advocacy such as the issuance of a newsletter designed to rally opposition against a housing project is protected under the First Amendment. However, *White* is distinguishable in that both it and the case upon which it relies, *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), specifically address the right of *private citizens* to advocate without limitation by the government. It is not applicable to a situation where, as here, the *government* is engaging in the advocacy. More fundamentally, *White v. Lee* involved only acts of advocacy, unlike the facts here, which included a variety of specific governmental conduct aimed at FHF, including withholding of funds.

governmental or coercive power. It does not address a situation where, as here, the unlawful activity involved coercive power and conduct, and transcended mere speech and advocacy. While Lakewood did proffer evidence of a non-retaliatory reason for its actions, that does not change the conclusion. FHF presented enough evidence to create disputed issues of fact on the issue of pretext to warrant moving forward with the FHA claim. *Walker, supra*, at 1130. It is not for the reviewing court on appeal from a summary judgment to determine disputed issues of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). It is the court's duty to remand disputed issues to the trier of fact, which is what the Ninth Circuit did in this case.

The overwhelming weight of authority refutes Lakewood's contention that the First Amendment issue is dispositive of liability in this case. Lakewood essentially assumes that First Amendment protections for speech and associational activity is absolute, or nearly so. However, it is well established that conduct protected by the First Amendment may still be relevant evidence in a court proceeding, and that such evidence is not judged by the incitement to violence standards of *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). In *Wisconsin v. Mitchell*, 508 U.S. 476, 480, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), the Supreme Court upheld the constitutionality of a Wisconsin penalty-enhancement statute based on intentional selection of a victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry. The Wisconsin Supreme Court had held that the statute violated the First Amendment by punishing offensive thought, *i.e.*, the racist motive behind the selection of the victim. A unanimous U.S. Supreme Court, in an opinion by Justice Rehnquist, reversed. The Court reasoned that the "*First Amendment...does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.*" *Id.* at 489 (emphasis

supplied). Nor does the Constitution "erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 486. *See also Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)(membership in Aryan Brotherhood not admissible in circumstances of that case because it was not sufficiently connected to any legitimate sentencing issue, but would be if nexus were shown); *Barclay v. Florida*, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983)(plurality opinion)(evidence of racial animus evidence admissible to determine capital punishment).

IV. CONDUCT WITHIN THE PURVIEW OF THE HCDA IS NOT THEREBY EXEMPT FROM PROVIDING A BASIS FOR VIOLATION OF OTHER STATUTES.

The Ninth Circuit is correct that nothing in the Housing and Community Development Act ("HCDA"), 42 U.S.C. §§5301-5321, prevents an aggrieved party from proceeding under a statute, such as the FHA, if the defendant's use of HCDA funds violates that other statute. *Walker*, *supra*, at 1127. To argue, as Lakewood does, that the City "merely decided not to use the funds it received from HUD to pay FHF" is to engage in the type of inference-making that is properly left to the trier of fact. *Anderson*, *supra*, at 249 ("[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). This is particularly true when there was sufficient evidence from which to infer a retaliatory motive for Lakewood's conduct. *Id.*[4] If there is an inference to be made, it should be made in

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[4] Petitioner's reliance on *Nabke v. U.S. Dept. of Housing and Urban Development*, 520 F. Supp. 5 (W.D. Mich. 1981), a district court decision, is to no avail. *Nabke* merely concluded that no private right of action exists under the HCDA, a wholly unremarkable proposition. *Nabke* did not involve a claim that the conduct violated the FHA or any other statute.

favor of the nonmoving party in this case, FHF. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

Recognizing that the HCDA does not abrogate the private right of action found in the Fair Housing Act, is consistent with the broad remedial purposes of Title VIII. "The language of the Act is broad and inclusive." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972). Vesting a private right of action in fair housing services organizations such as FHF encourages the complainants to act, not only on their own behalf, but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority, *i.e.*, eliminating discriminatory housing practices. *Trafficante, supra*, at 208. If, as this Court stated in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982), "'Congress intended standing under [the FHA] to extend to the full limits of Art[icle] III'" (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103, n. 9, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979), then the fact that the HCDA does not provide a private right of action has no bearing on the breadth of the FHA.

V. CONCLUSION.

For the reasons stated above, this court should deny the petition for a writ of certiorari.

Respectfully submitted

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